(5) No. 95-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR GHAITH R. PHARAON, AS AMICUS CURIAE IN SUPPORT OF REVERSAL

RICHARD F. LAWLER
Counsel of Record
JOHN M. NEWELL
PHILIP M. SMITH
JOHN C. CANONI
WHITMAN BREED ABBOTT & MORGAN
200 Park Avenue
New York, New York 10166
(212) 351-3000

Counsel for Amicus Curiae

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

PAGE

Constitution, Statutes, Rules and Regulations

Miscellaneous

BRIEF FOR GHAITH R. PHARAON, AS AMICUS CURIAE IN SUPPORT OF REVERSAL

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, Ghaith R. Pharaon ("Pharaon") respectfully submits this brief as *amicus curiae* in support of reversal of the decision of the Court of Appeals for the Ninth Circuit in *United States v. Real Property Located at Incline Village*, 47 F.3d 1511 (9th Cir. 1995). Letters of consent from Petitioner and Respondent have been filed with the Clerk of the Court.

Pharaon has no direct interest in Mr. Degen's case. Pharaon does, however, have a very strong interest in the lower courts' vast expansion of the "fugitive disentitlement doctrine": Pharaon has been subjected to the disentitlement doctrine in no less than six separate civil proceedings where he is a defendant. Both the government and *private* parties have sought to "disentitle" Pharaon from his due process rights in a wide variety of cases and contexts that are far removed from the civil forfeiture cases where it is most routinely used. It is hoped that the Court will find from a brief review of a few of the civil actions in which Pharaon has been subjected to the new "disentitlement doctrine" that its unfettered expansion into civil cases has led to substantial abuse.

Pharaon is a citizen and resident of Saudi Arabia. Throughout the 1970s and 1980s, Pharaon had banking relationships with many of the largest banks in the United States, Europe and the Far East. In the 1970s, like many other prominent Middle Eastern investors, he became a shareholder of a young but rapidly growing bank known as Bank of Credit and Commerce International ("BCCI").[1] Backed by Bank of America

---

[1] Pharaon will not distinguish in this brief between the over thirty BCCI-related entities.

and headed by Agha Hasan Abedi, a charismatic and purportedly visionary Pakistani banker, BCCI was expected to become the premier Middle Eastern and Third World bank.

In the early 1980s, Pharaon acquired National Bank of Georgia, a small, nationally chartered, publicly-owned bank based in Atlanta, Georgia. In 1985, Pharaon acquired Independence Bank, a small, state chartered bank, in Encino, California. In 1987, Pharaon sold National Bank of Georgia to Credit and Commerce American Holdings N.V. ("CCAH"), the holding company for First American Bank ("First American"), a large, regional bank headquartered in Washington, D.C. First American was headed by Clark Clifford and his law partner, Robert Altman. CCAH was owned by several prominent Middle Eastern businessmen who were advised by BCCI. In 1988, Pharaon acquired 25% of CenTrust Savings Bank in Miami, Florida.

In the Spring of 1990, stories emerged in the media that BCCI was being investigated by United States banking regulators and the New York County District Attorney. It was reported that BCCI might have used the CCAH shareholders as "front men" in the acquisition of First American and Pharaon as a "front man" in the acquisition of Independence Bank. It was also alleged that BCCI had secretly owned at least 50% of the voting shares of the National Bank of Georgia's holding company. The news reports also sought to connect BCCI with nefarious conduct around the world.

The media coverage of the "BCCI scandal" grew into a firestorm, involving as it did Mr. Clifford, an advisor to Presidents, and coming on the heels of the Savings and Loan crisis. Grand juries were impanelled across the country and Congressional committees began extensive investigations. Various prominent Middle Eastern businessmen, including Pharaon, were indicted in the United States District Court for the District of Columbia, together with Clifford, Altman and high-ranking BCCI officers, including Mr. Abedi and the acting head of BCCI, Swaleh Naqvi.

During the period 1991-1992, Pharaon was indicted in the following jurisdictions:

1. United States District Court for the District of Columbia, No. 91-CR-655-ALL, relating to (a) Pharaon's acquisition of Independence Bank as an alleged nominee for BCCI and (b) Pharaon's alleged participation in the parking of CenTrust debentures with BCCI.

2. Supreme Court of the State of New York, County of New York, relating to (a) Pharaon's acquisition of Independence Bank as an alleged nominee for BCCI and (b) BCCI's alleged 50% interest in Pharaon's 100% ownership of National Bank of Georgia.

3. United States District Court for the Southern District of Florida, No. 92-134-CR-GRAHAM, relating to Pharaon's alleged participation in the parking of CenTrust debentures with BCCI.

4. United States District Court for the Northern District of Georgia, No. 92-CR-331, relating to allegations with respect to National Bank of Georgia.

Pharaon was not in the United States during the period 1991-1992. There has never been an allegation that he fled from the United States to avoid prosecution, or that he has committed any crime by not travelling to the United States to face the indictments. There is no extradition treaty between the United States and Saudi Arabia.

Even before the indictments were filed, administrative proceedings were commenced by the Board of Governors of the Federal Reserve System ("Federal Reserve"), the principal architect of the BCCI investigations, against BCCI and some of its officers, the Middle Eastern investors and Clifford and Altman. All of the Federal Reserve's charges principally involved BCCI's alleged violation of Section 3 of the Bank

Holding Company Act, 12 U.S.C. § 1842, in acquiring ownership interests in banks without prior Federal Reserve approval. The Middle Eastern investors, including Pharaon, and Clifford and Altman were said to have aided and abetted BCCI's violation of the Bank Holding Company Act.

BCCI thereafter entered into a plea/settlement agreement with all United States authorities and agreed to forfeit approximately $500 million. Two of the most prominent and powerful businessmen in Saudi Arabia also settled with United States authorities. In 1992, one settled the United States charges for $105 million. In 1993, the second businessman agreed to pay $225 million to settle the charges against him. Other Middle Eastern businessmen and royalty who were charged have settled for lesser amounts.

The following is a brief chronology of the litigation that has ensued involving Pharaon. The instances where the disentitlement doctrine has come into play are highlighted.

In July 1991, the Federal Reserve filed "Notices of Intent to Prohibit" against Pharaon and others. These Notices sought to prohibit Pharaon from conducting further banking activities in the United States based on his alleged agreement to act as a nominee for BCCI's alleged 85% interest in Independence Bank and alleged 50% interest in National Bank of Georgia.[2] Pharaon had represented in his regulatory filing that he was to be the sole shareholder of both of these banks.

In September 1991, after the District of Columbia indictment was issued, the Federal Reserve amended its notice relating to Independence Bank to seek a $37 million civil money penalty. The Federal Reserve concurrently filed an action in the United States District Court for the Southern District of New York, *Board of Governors of the Federal*

[2] The allegations also included a charge that Pharaon, through one of the United States companies he operated, "brokered" a transaction whereby CenTrust illegally "parked" $25 million of debentures with BCCI.

Reserve System v. Ghaith R. Pharaon, 91 Civ. 6250 (PKL) ("SDNY Action"), and, upon the consent of Pharaon, froze all United States property alleged by the Federal Reserve to be owned by Pharaon.[3] As modified, the freeze order in the SDNY Action currently remains in effect on consent.

Pharaon immediately moved in the Federal Reserve administrative proceeding for discovery from over twenty persons and entities pursuant to the Federal Reserve's procedural rules, generally without objection from the Federal Reserve. The presiding Administrative Law Judge ("ALJ") granted Pharaon the discovery requested. Thereafter, Pharaon sought enforcement in the SDNY Action of certain subpoenas issued by the ALJ. He was opposed by the Manhattan District Attorney, who requested a stay pending his yet-to-be-filed indictment. The Manhattan District Attorney raised the disentitlement doctrine as one ground for the denial of discovery. Pharaon was denied enforcement of the subpoenas and the disentitlement doctrine was cited by the court as an additional reason to prevent Pharaon from obtaining discovery. *See Board of Governors of the Federal Reserve System v. Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991).

Immediately thereafter, the Federal Reserve moved for summary judgment against Pharaon in one of the administrative proceedings based on his alleged fugitivity from the District of Columbia indictment and the newly-filed New York State indictment that were both modeled after the Federal Reserve's charges. In the first decision ever to apply the so-called disentitlement doctrine against a *defendant* in a civil action, the ALJ granted the Federal Reserve's motion based on Pharaon's "affront to the dignity of the courts" and recommended that the Board of Governors of the Federal

[3] The assets seized included Interredec, Inc., a Georgia-based holding company with assets that were conservatively estimated to be valued in excess of $87 million. The Federal Reserve is currently holding over $42 million in cash and marketable securities from this seizure as security for any judgment obtained in its civil money penalty action.

Reserve enter an order requiring Pharaon to pay a $37 million civil money penalty and prohibiting him from participating in United States banking.

Pharaon appealed the ALJ's decision to the Board of Governors, which did not rule for over one year. In the meantime, the disentitlement doctrine was invoked against Pharaon by several private parties. First, in April 1994, the liquidators of BCCI filed a farfetched $3 *billion* RICO action against Pharaon based on the Independence Bank transaction and *immediately* filed a "Motion for Disentitlement." *BCCI Holdings (Luxembourg), S.A. v. Pharaon*, 94 Civ. 3058 (SHS) (S.D.N.Y.).[4] BCCI's motion to disentitle was based solely on Pharaon's alleged fugitive status. The Department of Justice and the District Attorney intervened and joined the request.

In July 1994, before the disentitlement issue was briefed in *BCCI Holdings v. Pharaon*, the Board of Governors of the Federal Reserve overruled the ALJ based on its doubt that the disentitlement doctrine could be applied in its administrative proceeding in light of the Court's decision in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993).

Beginning in November 1994, after the Board of Governors of the Federal Reserve had reversed the ALJ, limited discovery was obtained by Pharaon in connection with the Independence Bank charges. The ALJ apparently felt, however, that the Board of Governors' decision permitted him nonetheless to "disentitle" Pharaon from most discovery and access to witnesses. Whereas the ALJ had granted Pharaon discovery before the disentitlement doctrine was raised, he denied most of that same discovery after the Board of Governors' decision. The ALJ issued a series of disentitlement orders that denied Pharaon any depositions except as to the Federal

[4] In its complaint, BCCI even pled its argument that Pharaon should be disentitled. The only purported basis for personal jurisdiction was a $17.9 million promissory note executed in 1991 and personal guarantee from Pharaon providing for New York jurisdiction.

Reserve's own witnesses, even if key witnesses for Pharaon were not available for trial. Document discovery was extremely limited. Most significantly, the ALJ refused to accept testimony from Pharaon, except in person, even though deposition testimony was offered as an alternative.[5] In short, the ALJ had again disentitled Pharaon. Pharaon unsuccessfully sought interlocutory review by the Board of Governors of the ALJ's second wave of disentitlement rulings.

A four week hearing on the Federal Reserve's charges relating to Independence Bank was held in September and October 1995. At the conclusion of the hearing, without any new evidence or legal theory, the Federal Reserve suddenly increased the civil money penalty it sought to $111 million. The ALJ has yet to render his recommended decision.

In spite of the Federal Reserve's decision reversing the ALJ's initial disentitlement decision, the court in *BCCI Holdings v. Pharaon*, 94 Civ. 3058 (MBM), 1995 U.S. Dist. LEXIS 5115 (S.D.N.Y. Apr. 18, 1995) "disentitled" Pharaon. The court was, however, faced with a dilemma because: (a) Pharaon had appeared; (b) the plaintiff seeking the sanction was not a government entity; (c) Pharaon was a defendant and not seeking affirmative relief; and (d) a different court had issued the related indictment. Accordingly, the court imposed a disentitlement order that denied Pharaon any meaningful opportunity to defend by barring Pharaon from obtaining any discovery. At the same time, the court did permit Pharaon to present a defense.

Pharaon was, at that point, faced with the Federal Reserve's $111 million civil money penalty action and BCCI's $3 billion action. But that was not all. In January 1995, the Resolution Trust Corporation ("RTC") (now, the FDIC), as successor to

[5] The ALJ's ruling in respect to Pharaon's deposition was, of course, in direct contravention of Fed. R. Civ. P. 32(a)(3)(B) which expressly allows the use of depositions at trial of parties who reside more than 100 miles from the place of trial.

the then-closed CenTrust Savings Bank, commenced an action in the Southern District of Florida asserting claims that Pharaon aided and abetted breaches of fiduciary duty by CenTrust's chairman. The RTC claimed damages of $15 million.

The RTC's complaint, like BCCI's complaint, contained allegations in its opening paragraphs that Pharaon is a "fugitive" and, of course, the RTC immediately moved to "Strike Pharaon's Answer on the Principle of Disentitlement." The RTC's (now the FDIC's) motion to strike Pharaon's answer has been taken under consideration.

The disentitlement doctrine has also been raised against Pharaon in two other civil cases involving private parties, *Silvious v. Pharaon*, Civ. No. 93-0081-H (W.D. Va.) (the plaintiff being an apparently deranged prisoner in federal custody for bank fraud) and *Accent Films, B.V. v. Universal City Studios, Inc.*, Nos. 92-55286, 92-55343 (9th Cir.).

SUMMARY OF ARGUMENT

As the foregoing brief review makes clear, the so-called disentitlement doctrine, as it has been used against Ghaith Pharaon, has nothing to do with protecting the legitimate processes of the courts. In each of the cases brought by the Federal Reserve (for $111 million), BCCI (for $3 *billion*) and the FDIC (for $15 million), Pharaon has complied with every mandate of the courts and every rule governing the courts' procedures. In each case in which the disentitlement doctrine has been raised against Pharaon, either by a governmental agency or private party, however, it has been suggested as a way to *punish* Pharaon for not travelling to the United States to defend criminal charges, rather than as an exercise of each court's statutory and inherent power to control its own proceedings. *Compare Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

The disentitlement doctrine, as applied outside the context of appeals from criminal convictions where due process is *not* an issue, leads inevitably to unconstitutional decisions. The decision below should, therefore, be reversed because it stands for the proposition that an imagined affront to the dignity of another court should be given greater consideration in the conduct of a court's business than a defendant's unassailable right to due process under the Constitution.

Pharaon believes that the very serious constitutional problems with the expansion of the disentitlement doctrine into civil proceedings will be addressed in detail by Petitioner.[6] Pharaon will, however, make the following additional arguments:

I. The concept of disentitlement as developed by some of the lower courts, and as suggested by the government, is virtually indistinguishable from the ancient English concepts of outlawry, bills of attainder and forfeiture of estate that were never made part of our law and they are obviously inconsistent with the Due Process Clause and the prohibitions on bills of attainder. *See* U.S. Const. art. 1, § 9, cl. 3 and art. III, § 3, cl. 2.[7]

---

[6] It is difficult to understand why so many of the lower courts have found that a failure to answer criminal indictments automatically disentitles a *defendant* to procedural due process in a separate civil case. There is certainly no support in the Court's line of cases refusing to hear a fugitive's appeal from a conviction. Nor is there any apparent reason why these lower courts studiously ignore the Court's clear precedent that "status" makes no difference in defending a civil case. *E.g., McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870); *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274 (1876); *Hovey v. Elliott*, 167 U.S. 409 (1897). See *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151 (7th Cir. 1994). Again, these critical issues will be addressed in detail by Petitioner.

[7] Although this specific argument was not presented to the Court below by Petitioner, it can be fairly said to be subsumed in Petitioner's due process arguments. *See Davis v. United States*, 114 S. Ct. 2350, 2354 (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989). *Cf. O'Connor v.*

II. The creation of a "disentitlement doctrine" that prevents a foreign national from defending a civil action filed either by the government or a private party encourages the criminalization of offenses traditionally handled by negotiation or civil enforcement proceedings. Under the disentitlement doctrine formulated by many of the lower courts, when a criminal indictment is filed and the defendant does not appear, the floodgates are open. The plaintiff in the parallel civil proceedings will be ensured of automatic success for whatever penalty or damages are sought. The implications for due process and basic notions of fairness are significant.

III. Because a criminal proceeding is barred on double jeopardy grounds after the defendant is put in jeopardy for punitive civil penalties, it is unfair to deprive a defendant of due process in the civil enforcement proceeding based on the criminal proceeding that will have no viability after the civil proceeding.

ARGUMENT

I. THE LOWER COURT'S CONCEPT OF DISENTITLEMENT IS INDISTINGUISHABLE FROM THE ANCIENT AND BARBARIC CONCEPTS OF OUTLAWRY, BILLS OF ATTAINDER AND FORFEITURE OF ESTATE, WHICH NEVER BECAME PART OF OUR LAW AND ARE A VIOLATION OF THE DUE PROCESS CLAUSE AND THE PROHIBITION ON BILLS OF ATTAINDER

Under the ancient English concept of outlawry, "he who defied [the law] was outside its sphere; he was outlaw." 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 449 (2d ed. 1899). A defendant was "exacted, proclaimed, or required to surrender, at five

Ortega, 480 U.S. 709, 729 (1987). *But see Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 n.25 (1985).

county courts," and if he "does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise." 4 WILLIAM BLACKSTONE, COMMENTARIES *319 (emphasis in original). The consequence of outlawry for failure to answer even a misdemeanor charge or a civil action was forfeiture of all goods and chattels. *Id.* But an outlawry in "felony amounts to a conviction and attainer of the offense charged in the indictment, as much as if the offender had been found guilty." *Id.*

> For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party were found guilty or acquitted, if the jury found the flight, the party forfeited his goods and chattels: for the very flight was an offense, carrying with it a strong presumption of guilt[.]

Id. at *387 (emphasis in original). Thus, just like the government's theory of disentitlement, a judgment of outlawry "pronounced for absconding or fleeing from justice" was held to "tacitly confess[ ] the guilt. And, therefore, . . . upon judgment of outlawry, . . . a man shall be said to be attainted." *Id.* at *381. *See generally* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 604-07 (5th ed. 1942).

The reach of ancient outlawry, precisely like the disentitlement urged by the government, knew no bounds of territory or jurisdiction. A "man outlawed in one shire was outlaw everywhere." 2 POLLOCK & MAITLAND, *supra*, at 584. Like the government's theory of disentitlement, outlawry "was as clumsy as it was terrible":

> There were all manner of cases in which a man might be outlawed without being guilty of any crime or any intentional contumacy. The exaction [or demand for appearance] might, for example, take place in a county distant from his home.

Id. at 581.

Not surprisingly, the ancient doctrine of outlawry, whatever its vigor in medieval law, is considered antithetical to the due process of law guaranteed by the Constitution. In rejecting the proposition that courts have equitable power "to suppress an answer and thereupon render a decree *pro confesso*" (*Hovey v. Elliott*, 167 U.S. at 444), the Court explained that, "if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." *Id.* Consequently, "the severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law." *Green v. United States*, 356 U.S. 165, 171 (1958). *See also Parker v. Ellis*, 362 U.S. 574, 595 (1960) (Douglas, J., and Warren, C.J., dissenting) (the "fiction" that a defendant, though far away, was within the jurisdiction and should be proceeded against by outlawry worked "grievous injustices").

The Due Process Clause is not the only provision that blocks the resurrection of outlawry under the rubric of disentitlement. As explained above, outlawry was a form of common law attainder by which the accused was rendered "dead in law." 4 BLACKSTONE, *supra*, at *380. *See also id.* at *319, *380-81; *Respublica v. Doan*, 1 U.S. (1 Dall.) 86, 90, 91-92 (1794). The constitutional prohibition on bills of attainder (art. I, § 9) was drafted against the background of English common law and was adopted to prevent just such abuses of government power. Accordingly, that clause has long been understood to prohibit bills of pains and penalties and the other practices, such as outlawry, known as attainder to the common law. *See, e.g., Drehman v. Stifle*, 75 U.S. (8 Wall.) 595, 601 (1868).

The Constitution's ban on attainder is directed less at actions by a particular branch of the government than at abusive forms of punitive government action generally. As

Justice Powell explained in *INS v. Chadha*, 462 U.S. 919 (1983), although the "traditional characterization of [a] power as legislative, executive or judicial may provide some guidance . . . the more helpful inquiry . . . is whether the act in question raises the danger [ ] the Framers sought to avoid" through the separation of powers, that is, "the exercise of unchecked power." *Id.* at 965 n.7, 966 (concurring opinion). Accordingly, "the prohibition of Bills of Attainder place[s] beyond the pale the imposition of infamy or outlawry by either the Executive or the Congress." *Ullmann v. United States*, 350 U.S. 422, 453 (1956) (Douglas and Black, JJ., dissenting). As Justice Black wrote in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950), "[i]t is true that the classic bill of attainder was a condemnation by the legislature . . . while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution." *Id.* at 144 (concurring opinion). *See also id.* (opinion of the Court) (reversing dismissal of complaints by organizations challenging their inclusion by the Attorney General on a list of allegedly subversive groups). Surely the courts cannot possess a power of attainder denied by Article I to Congress itself.

Along the same lines and vintage as outlawry, is the concept of "forfeiture of estate." In medieval England, a convicted felon escheated his real property to the Crown for a year and a day, after which the property escheated to the lord; the felon's personal property was forfeited to the Crown. 1 POLLOCK & MAITLAND, *supra*, at 351-52. A convicted traitor forfeited both his real and personal property to the Crown. *Id.* In addition, the defendant who had suffered a "judgment of outlawry upon an indictment for felony" or who was convicted of a felony was subjected to "corruption of blood" whereby he lost his ability to inherit, to own or to devise property. 3 HOLDSWORTH, *supra*, at 69.

It cannot be doubted that "corruption of blood" and "forfeiture of estate" are prohibited by the Constitution. Article III provides that "no Attainder of Treason shall work to Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3, cl. 2. It is hardly worthy of debate that if "forfeiture of [*all*] estate" is unconstitutional for *treason*, it is *a fortiori* unconstitutional for offenses such as "flouting the dignity of courts," which is all that certain defendants today are alleged to have done to earn the outlaw brand of "disentitlement".

Using Pharaon's situation as an illustration of the vices of disentitlement, it is clear that "disentitling" Pharaon from defending a $42 million seizure, a $111 million civil money penalty proceeding by the Federal Reserve, a multi-billion dollar action by BCCI (a private party) and a $15 million lawsuit by the FDIC (another private party), is medieval in nature and buried beneath four centuries of American jurisprudence and constitutional law.

The concepts of outlawry, bills of attainder and forfeiture of estate should be left were they are—in ancient history.

II. APPLYING THE DISENTITLEMENT DOCTRINE IN A CIVIL PROCEEDING THAT IS PARALLEL TO A CRIMINAL PROCEEDING ENCOURAGES CRIMINALIZATION OF CIVIL OFFENSES AND EXPLOITATION BY PRIVATE PARTIES

Disentitlement has been applied against Pharaon in a way that is inconsistent, an abuse of the judicial system and a denial of basic due process. This should serve as a clear warning that disentitlement, as it is currently being applied, is an invitation to abuse.

Under cover of a criminal indictment, usually against a foreign national, litigants can now assert claims out of all proportion to actual loss without fear of challenge. As shown in

more detail below, Pharaon's case presents an illustrative example of what can happen in the current disentitlement climate in the lower federal courts. The Federal Reserve, which prior to BCCI had never before assessed a civil money penalty against an individual in excess of $600,000, began an unprecedented campaign against Pharaon and sought a $37 million penalty. Then, given the luxury of a disentitled defendant, raised the claim to $111 million. At the same time, BCCI commenced an action against Pharaon in New York for billions of dollars, followed by a $15 million action by the FDIC.[8]

Thus, there are two phenomena developing that serve as warning signs: First, the government has been encouraged to bring wildly disproportionate civil money penalty cases under cover of a criminal indictment. Second, private parties are exploiting the criminal proceeding in civil lawsuits that are either baseless or contain wildly exaggerated claims for damages.

Because these phenomena represent outrageous distortions of the American legal tradition and the Constitution, Pharaon has filed this brief as *amicus curiae*. Pharaon has denied all of the allegations against him, but it may help the Court if, for the sake of argument, we review one set of allegations against Pharaon, those relating to Independence Bank, from the persepctive of Pharaon's accusor.

---

[8] It is worth noting that in the only other case that we know of that BCCI filed in the United States, it similarly sought billions of dollars (over $30 *billion*) against an indicted foreign national and sought to disentitle him. *BCCI Holdings (Luxembourg), S.A. v. Mahfouz*, Civ. A. No. 92-27 63 (JHG), 1993 WL 45221 at *2-3 (D.D.C. Feb. 12, 1993). That court, however, did not disentitle the defendant and instead dismissed the case on *forum non conveniens* grounds. *BCCI Holdings (Luxembourg), S.A. v. Mahfouz*, 828 F. Supp. 92 (D.D.C. 1993). BCCI brought these cases in the United States, rather than in Europe and the Middle East, where it and these defendants are located, for one reason: the United States, to our knowledge, is the only country in the civilized world whose courts currently recognize disentitlement and allow a plaintiff to pursue claims without the distraction of a defense.

In simple terms, Pharaon is accused—in two indictments, in the Federal Reserve proceeding and *BCCI Holdings v. Pharaon*—of acquiring Independence Bank, partially on BCCI's behalf, with non-recourse loans from BCCI for part of the acquisition price.[9] BCCI's plan, according to the Federal Reserve, was to later seek Federal Reserve approval for its interests in these banks after BCCI restructured its worldwide operations to come under supervision by the Federal Reserve.

The alleged arrangement between BCCI and Pharaon, is what is called a "stakeout agreement." When banking laws were rapidly changing in the 1970s and early 1980s, many banks used stakeout agreements to acquire other banks in anticipation of a change in banking laws. When the laws changed, the purchaser would already have control over the target bank. Some of these arrangements were in the form of option agreements. These option agreements were and are acceptable to the Federal Reserve. *See* 12 C.F.R. § 225.31(a).

Other arrangements used by the purchasers to stakeout a target were the use of nominees, preferential financing arrangements and indemnifications in favor of the record owner. These arrangements were criticized by the Federal Reserve because they were viewed as having effectively given the undisclosed purchaser indirect control over the voting shares of the target banks without prior Federal Reserve approval. *See* Section 3(a) of the Bank Holding Company Act, 12 U.S.C. § 1842(a)(2).

These arrangements, when discovered, were always dealt with by negotiation between the Federal Reserve and the offending party.[10] Only in the case of repeated and continuing

[9] There are no allegations that Pharaon or BCCI received even one penny from these banks or engaged in unsafe banking practices.

[10] The Federal Reserve cited nine cases in its proceeding against Pharaon to demonstrate that stakeout arrangements, like the one it alleged Pharaon had with BCCI, were illegal. In each of nine cases, the issue of illegal stakeout arrangements was raised when the acquiring bank sought

violations after warnings from the Federal Reserve, were such violations the subject of a civil money penalty enforcement action. *See, e.g., Matter of Intramericas Investments, Ltd. and Peter Ulrich*, Docket No. 94-064-B-HC, (ALJ Recommended Decision) (Fed. Res. Bd. Dec. 14, 1995) (assessment of $10,000 civil money penalty against individual after repeated and continuing violations).

Other than in the case of Pharaon, his counsel has found no other criminal referrals for illegal stakeout arrangements. In addition, the Federal Reserve's civil enforcement remedies have been used sparingly and only after the negotiations to correct violations have proved unsuccessful. It is significant to note that, until BCCI, the largest civil money penalty ever assessed by the Federal Reserve against any individual in any kind of case, let alone a stakeout case, was $600,000, and that case involved looting, unsafe banking practices and repeated violations of the Bank Holding Company Act. *Burke v. Board of Governors of the Federal Reserve System*, 940 F.2d 1360 (10th Cir. 1991).

And yet the Federal Reserve seeks a $111 million civil money penalty against Pharaon, without a single allegation of

Federal Reserve approval for the acquisition of the target bank. The acquiring bank was viewed as having already indirectly acquired the target bank without prior Federal Reserve approval in violation of Section 3(a) of the Bank Holding Company Act. In seven of the nine cases, the Federal Reserve approved the acquisition anyway because it did not view the illegal stakeout arrangement as serious. *First United Bancorp., Inc.*, 61 Fed. Res. Bull. 889 (1975); *The Jacobus Co.*, 60 Fed. Res. Bull. 130 (1974); *Fulton Nat'l Corp.*, 64 Fed. Res. Bull. 121 (1978); *First Nat'l Holding Corp.*, 63 Fed. Res. Bull. 929 (1977); *Suburban Bancorp., Inc.*, 69 Fed. Res. Bull. 635 (1983); *F & M Operating Co.*, 59 Fed. Res. Bull. 117 (1973); *Locust Grove Banshares, Inc.*, 60 Fed. Res. Bull. 729 (1974). In one case, the illegal stakeout arrangement "reflected poorly on management" because it had continued after Federal Reserve officials had told the bank's management that the arrangement was illegal and the application was denied. *Florida Nat'l Banks of Florida, Inc.*, 62 Fed. Res. Bull. 696 (1975). In the last case, the Federal Reserve did not approve the application for reasons unrelated to the illegal stakeout arrangement. *Mid Am. Bancorp., Inc.*, 60 Fed. Res. Bull. 131 (1974).

wrongful conduct by Pharaon or BCCI directed at Independence Bank. On top of that, two criminal indictments were filed and a multi-*billion* dollar action was commenced by BCCI in concert with the government.[11]

The massive and unprecedented civil money penalty sought by the Federal Reserve and the multi-billion and multi-million dollar actions brought by BCCI and the FDIC are obviously premised on the assumption that Pharaon cannot defend himself because of the disentitlement doctrine. There is absolutely no rational basis for believing that this pattern of abuse under the guise of the new disentitlement doctrine will not be repeated in the future against foreign nationals.

III. EVEN IF THE APPLICATION OF THE DISENTITLEMENT DOCTRINE AGAINST CIVIL DEFENDANTS WAS A VALID EXERCISE OF A COURT'S INHERENT AUTHORITY, THE DISENTITLEMENT DOCTRINE CANNOT BE CONSTITUTIONALLY APPLIED WHERE THE GOVERNMENT HAS COMMENCED PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

What the government has done to Pharaon is to institute civil proceedings that are separate but parallel to criminal proceedings involving the same offense.

In Pharaon's case, the Federal Reserve has tried its $111 million civil money penalty action relating to Independence Bank, and the indictments relating to Independence Bank are, therefore, dismissable under settled law.[12] But the form of dis-

[11] United States prosecutors have intervened in *BCCI Holdings v. Pharaon* to urge disentitlement and the Federal Reserve has also recently moved to intervene. The joint government/private party coordinated attack on Pharaon is open and notorious, and has been admitted by both sides of the alliance on many record occasions.

[12] The government could not seriously argue that the Federal Reserve's $111 million civil money penalty action was "remedial" and not designed as a penalty. *See United States v. Halper*, 490 U.S. 435 (1989). Pharaon never made a penny from the Independence Bank transaction and his alleged secret stakeout agreement with BCCI did not cause any "damage" to the government. Nor can the Bank Holding Company Act's civil money penalty provisions be viewed as solely remedial. *See Austin v. United States*, 113 S. Ct. 2801 (1993). *Compare United States v. Morgan*, 51 F.3d 1105 (2d Cir.), *cert. denied*, 116 S. Ct. 171 (1995) (under Federal Deposit Insurance Act, $1.8 million civil money penalty in settlement was "within the bounds" of damage caused to the government.)

entitlement applied in the Federal Reserve administrative proceeding was based on those very indictments, as is BCCI's nearly identical multi-billion dollar action. Thus, under some lower courts' formulation of the disentitlement doctrine, even a criminal indictment dismissable on double jeopardy grounds can provide the basis for disentitling a civil defendant. If, in reality, there is to be no criminal proceeding, a foreign national's failure to appear in that criminal proceeding cannot rationally support his "disentitlement."

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

RICHARD F. LAWLER
Counsel of Record
JOHN M. NEWELL
PHILIP M. SMITH
JOHN C. CANONI
WHITMAN BREED ABBOTT & MORGAN
200 Park Avenue
New York, NY 10166
(212) 351-3000

Counsel for Amicus Curiae

February 22, 1996